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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1942

No. 353

IN THE MATTER OF VINCENT BENDIX, BANKRUPT.

ARMIN F. HILLMER, AS REPRESENTATIVE OF CREDITORS OF CHICAGO BANK OF COMMERCE,
Petitioner,

vs.

VINCENT BENDIX,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Counsel for Respondent.

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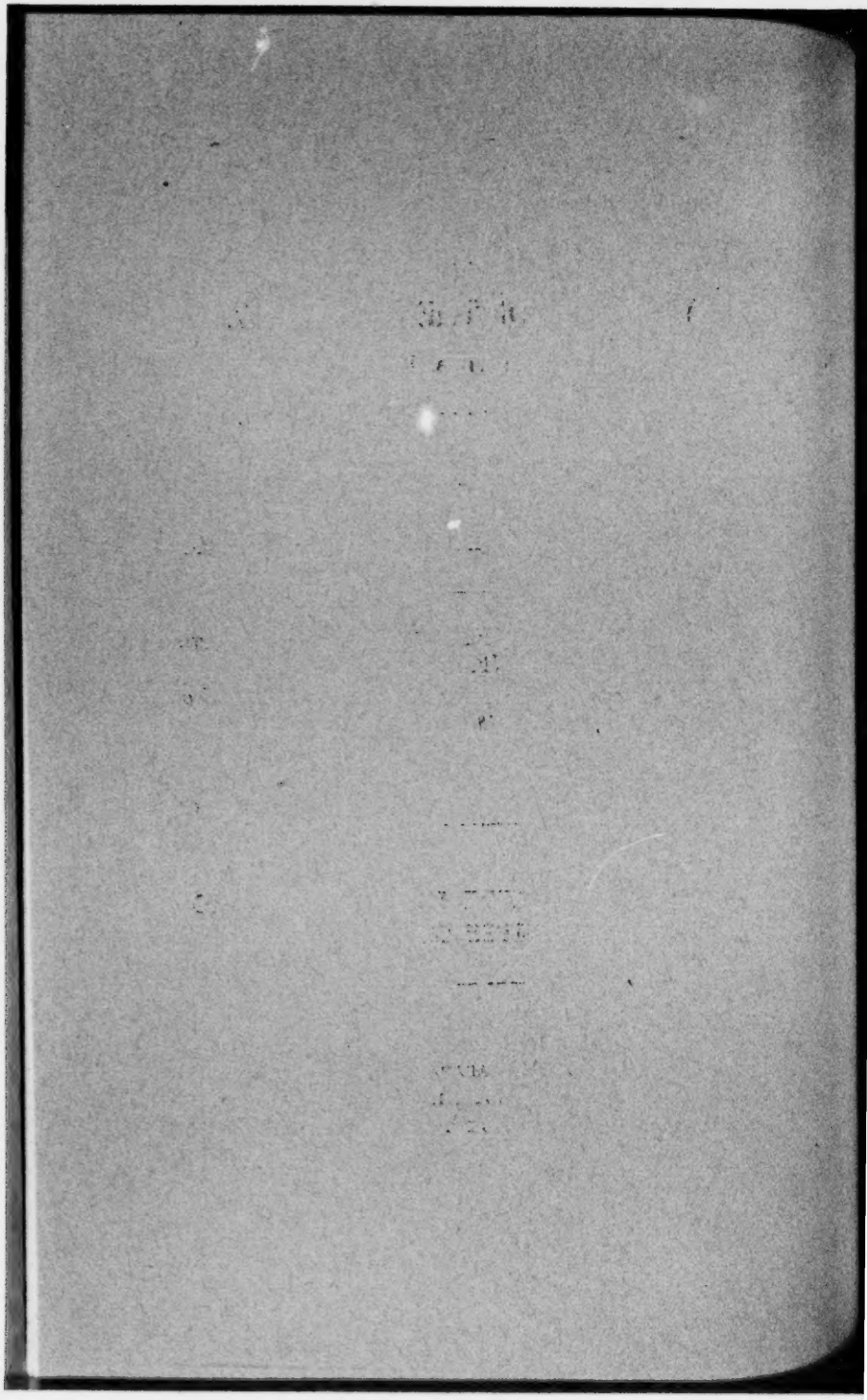

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

I.

STATEMENT OF THE CASE.

Petitioner has failed to comply with Supreme Court rule No. 27, Section 2 (d) in that he has not set forth in his brief a concise statement of the case. In lieu of this requirement he has set forth a detailed "statement of facts," (pages 6 to 12, incl. of his brief) which does not comply with the above rule and does not enable this Honorable Court to readily comprehend that which is material for the consideration of the questions presented.

II.

ARGUMENT.

SUMMARY OF THE ARGUMENT.

Point A.

The decision of the Circuit Court of Appeals of the Seventh Circuit In re Vincent Bendix, reported in 127 Fed. (2d) 759, is not in conflict with the decision of the Circuit Court of Appeals of the First Circuit. *Huntley* v. *Snider*, 86 F. (2d) 539 and 88 F. (2d) 335.

Point B.

The Circuit Court of Appeals for the Seventh Circuit has not erroneously decided a question of importance of Illinois law in conflict with the statutes of Illinois and the decisions of the Illinois courts.

Point C.

The first, second, third, fifth and sixth questions presented on page 3 of petitioner's petition and the first, second, third, fifth and sixth specification of errors on page 12 of petitioner's brief relate solely to the merits of the case and to questions of fact which are improper for consideration on a petition to this Court for a writ of certiorari.

Point D.

Petitioner has failed to comply with Supreme Court rule No. 27, Section 8, in that he failed to accompany the filing of his brief within the time required by satisfactory proof of service upon counsel for respondent.

Point E.

Petitioner in his petition (page 4) has failed to comply with Supreme Court Rule 38, Section 2, in that he has failed to set forth any reasons that can be relied upon for the allowance of the writ: (1) No reference is made to any decision of the Circuit Court of Appeals in conflict with the decision *In re Bendix;* (2) No claim is made that the alleged conflict with the Illinois law is a matter of importance, nor are the specific Illinois statutes or the specific decisions of the Illinois courts set forth, which are claimed to be in conflict with the decision of the Circuit Court of Appeals of the Seventh Circuit.

POINT A.

The decision of the Circuit Court of Appeals of the Seventh Circuit In re Vincent Bendix, reported in 127 F. (2d) 759, is not in conflict with the decision of the Circuit Court of Appeals of the First Circuit. Huntley v. Snider, 86 F. (2d) 539 and 88 F. (2d) 335; and Answer to Petitioner's Argument Point I.

There is no legal question presented by this petition and there is no question of importance presented by it. Petitioner apparently relies upon Section c, subsection (7) of Section 14 of the Bankruptcy Act, which provides as follows:

> "c. The court shall grant the discharge unless satisfied that the bankrupt * * * (7) has failed to explain satisfactorily any losses of assets or deficiency of assets to meet his liabilities: Provided, That if, upon the hearing of an objection to a discharge, the objector shall show to the satisfaction of the court that there are reasonable grounds for believing that the bankrupt has committed any of the acts which,

> under this subdivision c, would prevent his discharge in bankruptcy, then the burden of proving that he has not committed any of such acts shall be upon the bankrupt." (Bankruptcy Act, Sec. 14, 11 U.S.C. 32.)

Petitioner does not contend that he has sustained the burden of proof on any one of the numerous specifications of objection, either original or amended, that he filed in this case. However, petitioner urges that in this case the burden was upon the bankrupt to prove that he had committed no act which would prevent his discharge. Faced with the failure of direct proof the petitioner bases his attack on the findings of the Referee, which were subsequently approved by the District Court and the Circuit Court of Appeals, primarily on this legal theory: That the compromise by certain business associates of the bankrupt of claims asserted against them, (to which the bankrupt was not a party) raises as against the bankrupt himself an inference that he had committed acts sufficient to bar his discharge.

One case, and only one case, has been cited for the legal proposition upon which the petitioner relies. Of this case, *Huntley* v. *Snider*, 86 F. (2d) 539, 88 F. (2d) 335, only one thing need be said. The case does not hold, as contended by petitioner, that compromises by third persons raise an inference against the bankrupt that he has committed acts to bar his discharge or place upon him the burden of proof. The case simply holds that such matters of compromise may be considered as evidence in the case along with all other facts and circumstances.

This case is not mentioned by the Court of Appeals in its opinion. The reason that it is not mentioned may be inferred, namely, because the Referee stated that he had considered all of the evidence which included evidence concerning the compromises.

Judge Minton, in his opinion in the Circuit Court of Appeals for the Seventh Circuit *In re Bendix*, 127 F. (2d) 759, at 760, with reference to the burden of proof said:

> "If the Referee and the District Court thought there was reasonable ground to believe the bankrupt had committed the alleged acts, then of course the burden shifted to the bankrupt to explain. That called for an exercise of discretion, after a consideration of the facts. We have no way of knowing whether the lower court considered the burden was upon the objecting creditor or upon the bankrupt. All we know is that after eight days of hearing testimony and piling up a record of 882 pages, the Referee found the charges were not sustained, and the District Court sustained the Referee."

All this case holds, or can reasonably be considered as holding, is that compromises between a trustee and third parties may be introduced in evidence and considered by the Referee along with all the other circumstances of the case. The language of the Circuit Court of Appeals of the First Circuit, found on page 14 of petitioner's brief, makes this clear:

> "* * * the referee was right in considering in connection with other facts disclosed the circumstance that the bankrupt's wife on demand by the trustee had returned to the estate a substantial part of the property conveyed to her by her husband as above stated; that such evidence was relevant on the questions whether there were assets and whether the bankrupt knew of them and intended to conceal them."

We may search the opinions in *Huntley* v. *Snider*, 86 F. (2d) 539, 88 F. (2d) 335, from beginning to end and we can find no authority for petitioner's alleged proposition of law that the evidence of such compromise shifts

the burden of proof or is justifiable ground for denial of a bankrupt's discharge. Furthermore, the record in the *Bendix* case clearly shows that the referee had before him the several compromises that had been made by the trustee with third persons. He himself had approved these compromises and entered orders upon the same. The referee considered these compromises as competent evidence in the case; otherwise he would not have admitted them. Nor did the Circuit Court of Appeals of the Seventh Circuit at any time overrule or attempt to overrule or render its decision in conflict with the opinion of *Huntley* v. *Snider,* 86 F. (2d) 539, 88 F. (2d) 335. Judge Minton, in his opinion *In re Bendix,* 127 F. (2d) 759, certainly lays down no proposition of law whatsoever in conflict therewith. We have here upon the part of counsel for petitioner an attempt to construct some ground upon which he might base a petition for writ of certiorari before this Court. We challenge counsel's statement that the decision of the Seventh Circuit Court of Appeals is squarely opposed to the ruling in the *Huntley* case. We reaffirm that these compromises of claims were fully presented to the referee, to the trial court and to the Circuit Court of Appeals, and were considered as evidence in the case, but the *Huntley* case and no other case that can be cited holds that evidence of such compromises amounts to the establishment of a continued concealment or shifts the burden of proof.

POINT B.

The Circuit Court of Appeals for the Seventh Circuit has not erroneously decided a question of importance of Illinois law in conflict with the statutes of Illinois and the decisions of the Illinois courts; and Answer to Petitioner's Argument Point II.

The proposition of law set forth on page 17 of the brief of counsel for petitioner is a correct statement, but his statement that the Court of Appeals of the Seventh Circuit in this case has rendered a decision in conflict with the Illinois statute and the Illinois decisions is incorrect. Nowhere in the opinion of the Court does it deny the right of the objecting creditor to act for all of the creditors of the Chicago Bank of Commerce in filing objections to the bankrupt's discharge. Nor does the Court hold that a representative creditor is not a proper party in the bankruptcy of a stockholder. The Court merely mentioned in this connection that the petitioner had a deposit of $85.00 in the Chicago Bank of Commerce at the time that it closed and that there were other creditors who had filed and had allowed claims against the bankrupt amounting to in excess of $2,000,000.00.

The case was decided on its merits and not on the basis of the size of the objector's claims, nor was it contended by counsel for petitioner herein in his petition for rehearing of this cause filed in the Circuit Court of Appeals of the Seventh Circuit, that the original opinion of the Court was in conflict with the statutes of the State of Illinois and of the decisions of that state. This proposition is now presented for the first time before this Honorable Court on the petition for writ of certiorari.

POINT C.

The first, second, third, fifth and sixth questions presented on page 3 of petitioner's petition and the first, second, third, fifth and sixth specification of errors on page 12 of petitioner's brief relate solely to the merits of the case and to such questions of fact that are improper for consideration on a petition to this Court for a writ of certiorari.

Respondent denies that any one of these five questions are questions proper for presentation to this Court or are involved in the issues in this case. Taking up these questions in order:

"1. Whether under Section 14 of the Bankruptcy Act (11 U.S.C. 32) a court of bankruptcy is justified in placing the burden of proof upon the objecting creditor even though a number of associates of the bankrupt have surrendered to the trustee substantial sums of cash and valuable property."

The question of burden of proof is always a question of fact and under the Bankruptcy Law is within the sound discretion of the trial court. Nowhere in this record can be found any statement or holding by the Referee, the trial judge or the Circuit Court of Appeals that the burden of proof was ever placed upon the objecting creditor, except, of course, to sustain "to the satisfaction of the Court that there are reasonable grounds for believing that the bankrupt has committed any of the acts which under this subdivision c would prevent his discharge in bankruptcy. * * *" Bankruptcy Act, Sec. 14, 11 U.S.C. 32.

The Circuit Court of Appeals in its opinion in this case, *In re Bendix*, 127 F. (2d) 759, at 760, said:

> "If the Referee and the District Court thought there was reasonable ground to believe the bankrupt had

committed the alleged acts, then of course the burden shifted to the bankrupt to explain. That called for an exercise of discretion, after a consideration of the facts. We have no way of knowing whether the lower court considered the burden was upon the objecting creditor or upon the bankrupt."

"2. Whether under Section 14 of the Bankruptcy Act (11 U.S.C. 32) a court of bankruptcy is justified in placing the burden of proof upon the objecting creditor even though the bankrupt has, under the terms of a turnover order, been found to have made a transfer while insolvent for the purpose, and with the effect, of hindering, delaying and defrauding his creditors."

What we have said in answer to number 1 above applies equally to number 2. In addition, it should be noted that this so-called turnover order covered a transaction that had transpired more than seven years prior to the date of the filing of the petition in bankruptcy in this case, and the mere transfer, while insolvent, by a bankrupt for the purpose and with the effect of hindering, delaying and defrauding his creditors unless done within twelve months prior to the bankruptcy, is not a ground for denying the discharge in bankruptcy. *In re Doody*, 92 F. (2d) 653.

"3. Whether under the provisions of Section 14 of the Bankruptcy Act (11 U.S.C. 32) a court of bankruptcy is justified in refusing to consider assets surrendered to the trustee and assets ordered to be turned over to the trustee, as having been conveyed in fraud of creditors, as evidence of concealment of assets."

Nowhere in this record does it appear that courts below refused to consider assets turned over to the trustee and assets ordered to be turned over to the trustee as evidence of concealment of assets. In fact, the referee specifi-

cally stated at the time of the original hearing before him that he would consider and weigh all of the evidence in the case, including the evidence of compromises (Tr. 272). This proposition involves purely a question of fact.

"5. Whether a court of bankruptcy is justified in discharging a bankrupt whose books omit substantial transactions and contain material false entries."

Here again this question is purely one of evidence and of fact and has been decided by all three courts below adversely to the contention of objecting creditor. The Circuit Court of Appeals in its opinion, *In re Bendix*, 127 F. (2d) 759, at 761, said:

> "With reference to the keeping of books, the objecting creditor put on the stand the auditor employed by the trustee to audit the books of the bankrupt. The books and records were so elaborate and complete that it took the auditor and his assistants four hundred working days of seven hours each to audit the books. The auditor testified of the bankrupt and his books as follows: 'In our examination of these books we did not find any evidence of dishonesty upon the part of the bankrupt * * * All of the books that we had were in general in good shape * * * we found the differences and the books balanced out perfectly * * * he kept a substantially accurate set of books * * * I cannot give you any idea of the number of transactions that we have audited, but there were thousands of them.'
>
> "On evidence of that kind produced by the objecting creditor and not discredited or disputed, it would seem to us clear that such books met the requirement of the statute. 11 U.S.C.A. §32, sub. c.
>
> "There is no statutory mandate that books be kept. If books or records are not kept, that may be grounds

for denying a discharge. The determination of whether there have been kept such books of account of records from which the bankrupt's financial condition and business transactions might be ascertained, rests in the sound discretion of the trial court. The trial court has a wide discretion in determining whether adequate books or records were kept. That determination will not be disturbed on appeal unless there has been a clear abuse of discretion. There was no such abuse here. (Citing authorities.)"

"6. Whether a court of bankruptcy is justified in ratifying a bargain relating to the subject of discharge."

Nowhere in this record is there a scintilla of evidence supporting any such contention, nor did counsel for petitioner in any court below raise or attempt to raise any such extravagant proposition. For the first time in his petition for writ of certiorari before this Court he tries to infer or suggest that the bankrupt's discharge was bargained for and that the lower court ratified such bargain. We emphatically deny and condemn such inference.

Question presented in specification of error No. 4 is answered under Point B above.

POINT D.

Petitioner has failed to comply with Supreme Court rule No. 27, Section 8, in that he failed to accompany the filing of his brief within the time required by satisfactory proof of service upon counsel for respondent.

The records of this Court disclose that the brief in support of the petition for a writ of certiorari was presented to the Clerk of this Court on the 31st day of August, 1942, without being accompanied by satisfactory proof of service upon counsel for respondent. Service of a copy

of said brief upon counsel was not made until September 5, 1942. The petition for rehearing in this case was denied June 3, 1942. The last day for filing petition for writ of certiorari with the Clerk of this Court was September 3, 1942. Judicial Code, Title 28, Sec. 350.

Rule No. 27, Sec. 8, provides:

> "No brief, required by this rule, shall be filed by the clerk unless the same shall be accompanied by satisfactory proof of service upon counsel for the adverse party."

POINT E.

Petitioner in his petition on page 4 has failed to comply with Rule 38, Section 2, in that he has failed to set forth any reasons that can be relied upon for the allowance of the writ: (1) No reference is made to any decision of the Circuit Court of Appeals in conflict with the decision In re Bendix; (2) no claim is made that the alleged conflict with the Illinois law is a matter of importance, nor are the specific Illinois statutes or the specific decisions of the Illinois courts set forth, which are claimed to be in conflict with the decision of the Circuit Court of Appeals of the Seventh Circuit.

The mere statement of Point E above is conclusive argument that Rule 38, Section 2, of this Court has not been adhered to by counsel for petitioner, and such failure requires this Honorable Court to refer to the brief to ascertain claimed reasons relied upon for granting petition for writ of certiorari.

Answer to Petitioner's Argument Point III.

Counsel for petitioner under Point III states:

> "A discharge in bankruptcy should not be a subject of bargain and sale."

We question the propriety of counsel for petitioner to present for the first time before this Court a proposition, or an inference even, that the discharge of the bankrupt was the subject of bargain and sale. Nowhere, at any time at the hearing before the referee, on the petition for review before the District Court, or before the Circuit Court of Appeals did he venture to make such a startling assertion. Counsel appears to base his argument on this proposition on the alleged fact that the trustee in bankruptcy in this case failed to examine the bankrupt upon the hearing on objections to the bankrupt's discharge, and that certain compromises were made by this trustee with third parties. We have heretofore pointed out that the bankrupt was not a party to any of the compromises between the trustee and third parties referred to herein; that there is no evidence to show even that he knew of such compromises or that the same were being negotiated until long after their completion. The fact is that although the trustee did not file any formal objections to the bankrupt's discharge, yet in the early stages of the hearings the trustee was personally present and represented by counsel. The trustee's decision not to take a leading or aggressive role doubtless resulted from his discovery that the objecting creditor had in fact no grounds for his objection and was merely reintroducing and rearguing points that had been exhaustively considered at the first meeting of creditors, which continued over a period of six days, at which this particular objecting creditor, petitioner herein, had not elected to be present. But we submit that even if the trustee had not been present and had not participated in these proceedings and had actually been derelict in his duty, his failure cannot be considered in any way as prejudicial to the bankrupt. The argument about bargain and sale is wholly unsupported by the record and there is no factual basis for the same.

We resent the implication in the closing paragraph of counsel's brief on page 19. The facts in this case in no way disclose, as contended for by him, an intricate and clever plan for concealment of assets followed by a shrewd agreement to disgorge in part as the price of a discharge. The facts in this case are very involved. The testimony was voluminous. The hearings covered many days. Careful consideration and investigation was made by the referee. All questions were argued and briefed at great length. The referee and the trial court under the evidence exercised their discretion in holding that the bankrupt was guilty of no breach of the Bankruptcy Act, had committed no fraud, had kept proper books of account, had not concealed his assets and had satisfactorily explained the loss of his assets. The Circuit Court of Appeals of the Seventh Circuit found that the decision of the referee and the trial court was correct and affirmed their decisions.

CONCLUSION.

The questions presented by this petition for writ of certiorari go to the merits of the case and involve facts which are not pertinent to a decision by this Court.

It is, therefore, respectfully submitted that this case is not a proper one for review by certiorari in this Court, and that the petition for writ of certiorari should be denied.

Dated: September 18, 1942.

G. A. Farabaugh,
Counsel for Respondent.